

## MEMORANDUM

TO: Andy Haile, Chair, General Statutes Commission; Members, General Statutes Commission  
Floyd Lewis, Reviser of Statutes; Bly Hall, Assistant Reviser of Statutes  
CC: Working Group Members; Professors John Orth and Al Brophy  
FROM: Judith Wegner, General Statutes Commission Member  
RE: Report on discussions with bar leaders about tenancy by the entirety & GSC docket  
DATE: January 29, 2016

### Introduction

As you know, the General Statutes Commission (GSC) voted in October 2015 to open a docket on possible changes in North Carolina state statutes relating to tenancy by the entirety. Based on discussion with Mr. Lewis earlier this week, I understand that the Commission hopes to return to this matter at its next meeting on February 5.

I'm writing to report on a meeting that I attended today with members of the new Ad Hoc Working Group on Same Sex Marriage and Real Property ("Working Group") that includes leaders of the North Carolina Bar Association's real property, family law and trusts and estates sections.<sup>1</sup> Each of these sections has been independently considering whether to recommend statutory revisions relating to same-sex marriage in the aftermath of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as well as other lower federal court decisions directly implicating same-sex marriage in North Carolina. See *Bostic v. Schaefer*, 760 F.3d 352 (4<sup>th</sup> Cir., July 2014); *General Synod of the United Church of Christ v. Resinger*, 12 F.Supp.3d 790 (W.D. N.C., Oct. 10, 2014); *Fisher-Borne v. Smith*, 14 F.Supp.3d 695 (M.D. N.C., Oct. 14, 2014).

After a very thorough discussion, the Working Group expressed strong consensus support for statutory amendments it believes are truly essential and immediately needed to deal with and protect tenancy by the entirety for all families in North Carolina. The Working Group discussed two drafts of possible legislative language and by consensus supported the proposed statutory amendments attached in Appendix A for reasons more fully elaborated below.

Representatives of the Working Group from the real property, estate planning and family law bar would like to offer a background presentation to the GSC during the morning portion of its February 5, 2016 session.<sup>2</sup> These representatives will also provide the GSC with additional background regarding areas in which they anticipate developing additional proposals over the next two-three years (additional technical amendments that go beyond the immediately needed reform of the tenancy by entirety statutes, and substantive law reforms relating to court decisions mandating the recognition of same-sex marriages). This Memorandum is intended to provide related background to the members of the General Statutes Commission.

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<sup>1</sup> A list of the members of the Working Group, with their contact information and affiliations, is provided in Appendix C.

<sup>2</sup> Those likely to be able to attend the February 5, 2016 meeting of the GSC in person or by phone include: James Creekman (real property section); Tonya Powell (real property section); Nancy Johnson (trusts and estates section); Stephanie Gibbs (family law section); and Nancy Short Ferguson (title insurance and real property section) (or other title insurance representative). Their contact information is provided in the list included in Appendix C.

## Reasons Why Immediate Revision of North Carolina Statutes Relating to Tenancy by the Entireties Is Essential

1. Importance of tenancy by the entireties to families in North Carolina and other states. North Carolina has long embraced “tenancy by the entireties” as a preferred mode of concurrent ownership for married couples. It has understood tenancy by the entireties as a means by which married couples can hold real estate as a family unit. Neither spouse can alienate property without the consent of the others. Creditors of individual spouses cannot reach property held by the entireties. This result flows from the long-held English tradition that regards “entireties” properties as held by the spousal unit (together, as a third party, so that creditors of one or the other of the spouses cannot reach it). While I do not have statistical information about the proportion of concurrently owned real property in North Carolina that is held by the entireties, I would estimate that at least 80-90% of real property that could be held in the entireties is indeed held by the entireties.

The closest alternative form of concurrent ownership is “joint tenancy with right of survivorship,” also permitted under our statutes. Joint tenancy can be severed by any one of the owners, and can accordingly be converted into tenancy in common (and thus subject to partition). Each parties’ share can also be reached by creditors. North Carolina’s tenancies by the entireties tradition is a widely recognized means of protected property (such as homes) that is essential to families.

2. Potential litigation challenges could put the legal future of tenancy by the entireties in North Carolina in jeopardy for all, resulting in significant destabilization of land titles, creating risks and hardship that could be avoided through simple technical statutory clarifications. There is little doubt that denying same-sex married couples access to the opportunity to hold real property as tenants by the entireties could be challenged in litigation. A review of decisions on same-sex marriage by other state supreme courts under their state constitutions indicates that those courts have explicitly concluded that a failure to extend rights to hold property under tenancy by the entireties for same-sex married couples is a potent justification for striking down state practices as a matter of federal or state equal protection law.

Two possible results could arise from such litigation. On the one hand, courts could hold that denial of rights to hold real property for married same sex couples in tenancy by the entireties violates equal protection rights under case law noted above, and same sex couples should be extended rights to hold property in this way. On the other hand, courts might strike down tenancy by the entireties as a form of concurrent ownership for anyone, and move North Carolina in the direction of South Carolina and other jurisdictions (which have abolished tenancy by the entireties altogether because of the historical rules that provided that only husbands could control the proceeds stemming from entireties property, in contravention of Married Women’s Property Acts). Failing to clarify the rights of all married couples with regard to concurrently owned real property creates a significant risk that tenancy by the entireties could be struck down altogether. If that were the result, real estate held by both married heterosexual and same-sex couples might be converted judicially to joint property with rights of survivorship, and could thereafter be subject to sale by just one spouse and claims by creditors, resulting in adverse results to North Carolina families.

3. Current statutes might be reinterpreted to comply with recent federal mandates regarding equal protection for married same-sex couples, but delays in clarifying their language will only increase the potential costs and uncertainty in land titles associated with potential litigation. The Working Group discussed concerns about delays in resolving potential issues concerning titles held in tenancy by the entireties. Often, litigation about real property issues can take from 2-4 years before ultimate resolution. North Carolina is a state that is experiencing significant growth in population and in-migration. In recent years a growing number of states have recognized same-sex marriage, even before the US Supreme Court’s decision in *Obergefell*. Thus, there is an increasing risk of litigation by married same-sex couples moving into the state who wish to hold real property in tenancy by the entireties. The Working Group

discussed this issue and concluded that litigation is indeed likely and that litigation would likely drag on for a number of years, during a period of rapid real estate transfers in North Carolina. There is little to be gained by waiting to clarify relevant legal doctrine, and any delay will be likely to destabilize land titles.

4. The North Carolina/South Carolina State boundary line dispute has created risks of clouded land titles for affected property and it is essential to confirm the details of North Carolina tenancies by the entirety law where South Carolina no longer permits property to be held in that form of concurrent ownership. There is an active dispute between North and South Carolina regarding the location of state boundaries. North Carolina recognizes tenancy by the entireties. South Carolina does not. State boundary disputes can be resolved by action of the United States Congress. At present, however, property owners situated at the border of North and South Carolina are being urged to resolve this dispute through legal fiction, namely, through treatment of the dispute as a “mistaken” understanding of where the actual state line should be seen to exist. As a result, those property owners (both in North and South Carolina) are being told that, where there is an historic ambiguity, they should seek to have South Carolina titles established by South Carolina lawyers whose opinions should in turn be confirmed as governing should those properties be subsequently treated as existing in North Carolina (and vice versa). Apparently, title insurance companies in both states are uneasy about certifying titles and issuing insurance in this contested area. Time is therefore of the essence in confirming the status in North Carolina of real estate held in tenancy by the entireties (whether held by married heterosexual couples or by married same-sex couples). Since the abolition of tenancies by the entireties in South Carolina, lawyers have attempted to create alternative mechanisms to create equivalent protection but have been unsuccessful and have only created ambiguous rights subject to litigation. See, e.g., *Smith v. Cutler*, 623 SE 2d. 644 (SC 2005). Clarification is accordingly needed.
5. A growing number of married same-sex North Carolina couples are requesting that their attorneys place purchased property in tenancy by the entirety, but there is no fully comparable alternative means to protect them and their families’ interests. Members of the Working Group who advise long-term and new residents of North Carolina noted that they often face inquiries regarding whether real property rights can be held in tenancy by the entireties. They have affirmed (as did the Working Group as a whole) that it is problematic not to resolve ambiguities in means of holding real property to protect families who desire to know their option and possible rights. The Working Group as a whole also confirmed that there is no legally clear and firmly established alternative means of creating rights to real property to be held by legally married same-sex couples that would provide equivalent protections for same-sex married couples and their families, or heterosexual married couples and their families if the North Carolina law of tenancy by the entireties for all were struck down by the courts. The Working Group accordingly concluded that in the interest of fairness to all married couples, and in the interest of stable land titles, North Carolina statutes should be revised.

### Proposed Statutory Revisions.

The Working Group discussed appropriate textual revisions of three statutes on tenancy by the entireties and offer the attached drafts for consideration by the GSC. In the Working Group’s view, the three statutes that should be addressed immediately are:

- NC GS § 39-13.6 (Control of real property held in tenancy by the entireties). The proposed language is similar to that originally included in my memorandum suggested that the GSC open a docket on tenancy by the entireties, but it was perfected for clarity by suggestions from James Creekman and other members of the Working Group. One topic of special interest to the GSC may be how the effective date of the proposed technical revision should best be set. The Working Group defers to Mr. Lewis and Ms. Hall who deal with such matters routinely, but have attempted to address that topic appropriately in the draft (assuming that titles taken by same-sex married couples coming to

North Carolina before the Fourth Circuit and North Carolina federal district court rulings in October 2015 could not have reasonable expectations of taking title in the form of tenancy by the entirety in North Carolina.

- NC GS § 39-13.7 (Tenancy by the entirety trusts in real property).
- NC GS § 41-2.5. (Tenancy by the entirety in mobile homes.)

Proposed text is included as Appendix A to this memorandum. It is under further review by members of the Working Group and, if needed, a revised version will be circulated prior to the upcoming GSC meeting.

Three modest additional points are worth making.

- *Additional language re notice for proposed revised NC GS § 39-13.7.* The proposed revisions of NC GS § 39-13.7 include a placeholder reference regarding enhanced notice that is currently being considered by the Estates and Trusts Section as a proposed technical change unrelated to the law of same-sex marriage. The Section hopes to confirm its desire to address this matter and recommend requisite language for consideration of the GSC at the same time that the changes relating to the law of same-sex marriage are addressed.
- *Changes in NC GS § 41-2 relating to survivorship.* Work is also underway by the Estates and Trusts Section to develop proposed technical changes in NC GS § 41-2 (relating to rights of survivorship). It is likely that such proposals will be ready for the long session beginning in 2017, but not for the upcoming short session.
- *Changes in NC GS § 12-3 relating to rules of construction.* The Working Group discussed at some length whether to recommend that the GSC also (or alternatively) consider a technical revision to add language to NC GS § 12-3 that defines “husband and wife” and related terms, as well as the term “spouses.” The Group concluded that such a revision might, standing alone, serve to guide judicial interpretation of the other statutes recommended for revision, but ultimately thought that it would be best to recommend immediate action on specific revisions to statutes explicitly addressing tenancy by the entirety as such, and instead suggest revision of this broader provision at a subsequent date. Possible language for a revision to NC GS § 12-3 is, however, included in Appendix B in the event the GSC would like to consider that alternative.

#### Anticipated Need for Future Technical and Substantive Changes.

The Working Group also had a preliminary discussion of a variety of other statutory changes that may be desirable to clarify North Carolina law in the aftermath *Obergefell*. Representatives from the three sections represented (real property, family law, and trusts and estates) described their own efforts to identify needed technical and substantive changes. James Creekman distributed careful drafts touching on a number of related matters such as the following:

- Suggested Changes to G.S. 29-30, the statute entitled "Election of surviving spouse to take life interest in lieu of intestate share provided."
- Suggested Changes to Article 2 of Chapter 39. Article 2 is entitled "Conveyances by Husband and Wife." Chapter 39 is entitled "Conveyances."

- Suggested Changes to Article 1 of Chapter 41. Article 1 is entitled "Survivorship Rights and Future Interests." Chapter 41 is entitled "Estates."
- Suggested Changes to Chapter 50. Chapter 50 is entitled "Divorce and Alimony."
- Suggested Changes to Chapter 51. Chapter 51 is entitled "Marriage."
- Suggested Changes to Chapter 52. Chapter 52 is entitled "Powers and Liabilities of Married Persons."
- Suggested Changes to Chapter 105. Chapter 105 is entitled "Taxation."
- Suggested Miscellaneous Changes suggested in a variety of statutes based on his review of matters relating to married couples (same-sex or heterosexual).

The Working Group members agreed to circulate these additional drafts to their respective Sections for consideration. The Working Group hopes to develop a strategic plan that could extend over 3-5 years in order to develop and present statutory revisions to appropriate entities such as the GSC and various legislative committees over that extended time period. Members of the Working Group also expressed appreciation for the fine work of legislative staff (specifically the work of Mr. Lewis and Ms. Hall) in anticipating and addressing needs for gender-neutrality and related matters as they have worked on statutory revisions as recommended by NCBA Sections. Members of the Working Group would welcome counsel from the GSC and legislative staff regarding how to proceed in this regard during the conversation anticipated as part of the February 5 GSC meeting.

#### Additional Research and Expert Testimony.

I have become increasingly interested in issues related to tenancy by the entireties and other property issues raised by the legalization of same-sex marriage. I have accordingly begun work on a law review article on these topics and could share related information with colleagues on the GSC if they desire more in-depth information. Two of my UNC Law colleagues (Professors John Orth and Al Brophy) also have considerable expertise in this and related areas, as do other family law colleagues (Professors Maxine Eichner and Holning Lau). If the GSC wishes to schedule testimony by law professors (including but not limited to those from UNC), I am sure that they would be willing to assist. In the meantime, I have attached a more detailed research memorandum as Appendix D, along with recent surveys of state statutes relating to tenancy by the entireties.

#### Conclusion.

This Memorandum has summarized insights relating to needed statutory revisions in response to recent court decisions concerning same-sex marriage, that were gleaned from discussions with the members of the Working Group (including leaders from the NC Bar Association's sections on real property, trusts and estates and family law).

- The Working Group thanks the GSC for establishing a docket relating to technical statutory changes relating to tenancy by the entireties.
- It expresses the consensus view that technical changes in three North Carolina statutes relating specifically to tenancy by the entireties are essential and warrant immediate action in the short session. These technical amendments are needed in order to protect long-standing North Carolina policies that recognize concurrent ownership in the form tenancy by the entireties as a means

essential to protecting families and their welfare against the risks of dispersal of family assets through the actions of just one spouse or claims by creditors.

- The Working Group believes that such technical amendments will help to avoid likely litigation that could destabilize land titles on a wide-spread basis (since court challenges could result in disallowing continued use heterosexual married couples if equal rights for same-sex married couples are denied). The proposed changes would also clarify the impact of federally mandated changes in the law of same-sex marriage, avoid costly litigation that could unsettle property titles, and address the implications of the ongoing North Carolina-South Carolina boundary dispute.
- Proposed statutory language to address necessary technical changes in legislation regarding tenancy by the entirety is provided in an Appendix. Additional statutory changes are under consideration by relevant sections of the North Carolina Bar Association and may be presented to the GSC or other appropriate entities in subsequent years.

Thank you for your consideration.

Appendices (separate documents attached)

- A. Proposed changes in tenancy by the entirety statutes
- B. Possible changes in statutory construction statute
- C. Members of the Working Group and contact information
- D. Wegner research memorandum